

Message Text

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SUBJ: AIR FORCE TRIALS; COMPETENCE OF COURT

1. SUMMARY. IN FIRST MAJOR DECISION OF FACH TRIALS. COURT HAS UPHELD ITS COMPETENCE IN RESPONSE TO DEFENSE CHALLENGES THAT AS "WARTIME COURT MARTIAL" IT LACKS JURISDICTION OVER CRIMES COMMITTED PRIOR TO SEPT 11. COURT'S DECISION, HOWEVER, AVOIDED DISCUSSION OF WHETHER STATE OF WAR INDEED EXISTED PRIOR TO COUP AS HAS BEEN ALLEGED BY FACH PROSECUTION. END SUMMARY.

2. FIRST ORDER OF SUBSTANTIVE BUSINESS IN CURRENT AIR FORCE TRIALS WAS PRESENTATION APRIL 18 OF MOTION BY DEFENSE ATTORNEYS TO HAVE COURT DECLARE ITSELF INCOMPETENT TO RULE ON CASES. LAWYER HORACIO CARVAJAL, DEFENDING CAPTAIN DANIEL AYCINENA, BASED HIS CLAIM OF INCOMPETENCE ON FACT THAT WARTIME MILITARY TRIBUNAL SHOULD NOT HAVE JURISDICTION TO TRY CASES OF CRIMES ALLEGEDLY COMMITTED PRIOR TO SEPT 11 WHILE CHILE IN STATE OF PEACE. LAWYER MARCELO CROXATTO REPRESENTING SGT. JUAN RAMIREZ PRESENTED SAME CLAIM BUT AMPLIFIED IT ARGUING THAT SINCE DECREE LAW NO.3 WHICH DECLARED STATE OF SIEGE, AN ESSENTIAL PREREQUISITE FOR ESTABLISHMENT OF WARTIME MILITARY TRIBUNALS, WAS NOT PUBLISHED IN DIARIO OFICIAL UNTIL SEPT 18, COURT HAS NO AUTHORITY TO DEAL WITH FACH JUDICIAL PROCESSES LEADING TO CURRENT TRIAL WHICH FORMALLY BEGAN ON SEPT 14. (DECREE LAW NO. 3 WAS AMENDED

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ON SEPT 22 BY DECREE LAW NO. 5 WHICH HOLDS THAT STATE OF SIEGE

SHOULD ALSO BE UNDERSTOOD TO MEAN STATE OF WAR.)

3. DEFENSE MOTION PROMPTED IMMEDIATE RESPONSE FROM FACH PROSECUTION. IN PRESS RELEASE OFFICE OF FACH FISCAL (CHIEF PROSECUTOR) RETORTED THAT CODE OF MILITARY JUSTICE ENVISIONS WARTIME SITUATIONS EXISTING PRIOR TO THE ISSUANCE OF THE ACTUAL DECLARATION OF WAR. CRUX OF FACH ARGUMENT IS THAT "STATE OF WAR BEGAN WHEN ELEMENTS OF THE UP AND EXTREMIST GROUPS WHICH BELONGED TO IT CLANDESTINELY BROUGHT ARMS INTO THE COUNTRY, WHEN THEY ORGANIZED THEMSELVES MILITARILY AND WHEN, THROUGH THE ACCUSED, THEY TRIED TO OBTAIN MILITARY SECRETS AND, IN SOME CASES, WERE SUCCESSFUL."

4. COURT MARTIAL ISSUED ITS RESPONSE TO DEFENSE MOTIONS ON APRIL 19. MOTIONS WERE DENIED BY SIGNIFICANTLY COURT DID NOT ALLUDE TO ARGUMENT OFFERED BY FACH, BUT RATHER CONFINED ITSELF TO NARROW DEFINITIONS OF LEGAL TEXTS. COURT DECISION REVIEWS VARIOUS ARTICLES OF CODE OF MILITARY JUSTICE AND POSITS THAT FOR MILITARY COURTS IN TIME OF WAR TO ENTER INTO FORCE, THREE REQUISITES MUST BE MET: (A) DECLARATION OF STATE OF ASSEMBLY OR SIEGE; (B) NAMING OF GENERAL IN CHIEF; AND (C) EXISTENCE OF A FOREIGN ENEMY OR REBEL FORCES. COURT ARGUES THAT EVENTS OF SEPT 11 AND SUBSEQUENT DAYS DEMONSTRATED THAT ALL THREE REQUISITES WERE MET.

5. REGARDING FIRST REQUISITE. COURT REJECTS ARGUMENT ABOUT DATE OF PUBLICATION OF DECREE LAW NO. 3 AND NOTES THAT SEPT 18 ISSUE OF DIARIO OFICIAL WAS FIRST PUBLISHED AFTER SEPT 11 OWING TO INTERNAL DISORDER. THUS DECREE LAW NO. 3 AS WELL AS OTHERS PUBLISHED SAME DAY IN EFFECT RETROACTIVE TO SEPT 11. FURTHER, ON SEPT 11 NEW GOVT HAD MADE CLEAR IN "BANDOS" ISSUED OVER RADIO AND TV THAT COUNTRY UNDER STATE OF SIEGE. COURT STATES THAT SIMPLE FACTS THAT ARMED FORCES ENGAGED IN COMBAT LED BY OFFICERS OR ENLISTED MEN ON SEPT 11, THOUGH FORMAL NAMING OF ZONE GENERALS IN CHIEF NOT PUBLISHED UNTIL LATER DATE, AND THAT THESE FORCES MET ARMED RESISTANCE, SATISFY SECOND AND THIRD REQUISITES.

6. COURT ALSO ARGUES THAT IT NOT IN CONTRAVENTION OF ARTICLE 12 OF CONSTITUTION WHICH STATES "NO ONE CAN BE CHARGED BY SPECIAL COMMISSIONS BUT RATHER ONLY BY COURTS WHICH THE LAW INDICATES UNCLASSIFIED

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AND WHICH HAVE BEEN ESTABLISHED BEFORE THE CRIME." COURT NOTES THAT WARTIME MILITARY TRIBUNALS HAD BEEN ESTABLISHED BY CODE OF MILITARY JUSTICE PUBLISHED IN 1926 AND THAT THEY THEREFORE EXISTED PRIOR TO THE COMMISSION OF THE ACTS AND WERE SIMPLY ACTIVATED SUBSEQUENTLY BY OTHER CAUSES.

7. IN SUM, COURT UPHOLDS VALIDITY OF DECREE LAW NO. 13 WHICH INTERPRETS ARTICLE 73 OF THE CODE OF MILITARY JUSTICE

TO HOLD THAT ONCE STATE OF SIEGE DECLARED (I.E. IN COURT'S ARGUMENT, SEPT 11), ALL MILITARY JUDICIAL PROCESSES BEGUN SUBSEQUENT TO THAT DATE ARE DEALT WITH BY WARTIME MILITARY TRIBUNALS AND THAT ALL WHICH HAD BEGUN PRIOR TO THAT DATE WOULD CONTINUE TO BE DEALT WITH IN NORMAL PEACETIME MILITARY TRIBUNALS. DATE OF COMMISSION OF ALLEGED CRIME, THAT IS WHETHER BEFORE OR AFTER SEPT 11, IS THEREFORE IRRELEVANT. ACCORDING TO COURT, DETERMINATION OF APPROPRIATE MILITARY TRIBUNAL (PEACETIME OR WARTIME) IS PROPERLY BASED ON DATE OF INITIATION OF JUDICIAL PROCESS WHICH IN MOST CASES IS POST SEPT 11 AND THEREFORE NECESSITATES TRIALS BY WARTIME MILITARY COURTS. PRIMARY DIFFERENCE BETWEEN PEACETIME AND WARTIME MILITARY TRIBUNALS IS LACK OF DEFENDANT'S RIGHT TO APPEAL DECISIONS OF LATTER TO CIVILIAN COURTS.

8. WE INTEND TO SEND SHORTLY ANALYTICAL TELEGRAM ON SOME BASIC LEGAL POINTS RAISED BY TRIALS.
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